United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-2233

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2233

In Re

CONTINENTAL VENDING MACHINE CORP. and
CONTINENTAL APCO, INC.,

Debtors.

JAMES TALCOTT, INC.,

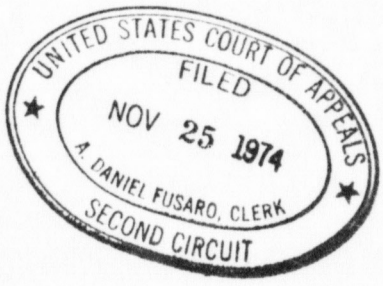
Appellant,

IRVING L. WHARTON, TRUSTEE,

Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

APPENDIX



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RELEVANT DOCKET ENTRIES
RE: CONTINENTAL VENDING MACHINE CORP.

7/10/63	Creditors' Petition for Reorganization pursuant to Chapter X - Sec. 127 filed.	(2)
7/12/63	By Mishler, J. - Order filed approving petition etc. trustees appointed etc. Bond joint & several etc. $100,000.	(6)
9/21/63	By Mishler, J. - Order filed making appointment of temporary Trustees John P. Campbell and Irving L. Wharton permanent and that their bonds heretofore given shall be continued.	(60)
9/4/64	Application of John P. Campbell for resignation as Trustee filed.	(229)
9/14/64	By Mishler, J. - Order filed that the resignation of John P. Campbell trustee is hereby accepted; effective as of date of this order; further ordered that Irving L. Wharton be continued as sole trustee, etc.; further ordered that John P. Campbell and continuing trustee take necessary steps to effect said resignation, etc.	(232)
6/13/69	Statement and Report of Irving L. Wharton, Trustee in Reorganization of the Debtors, Pursuant to Section 167(5) of the Bankruptcy Act filed. (Copies mailed to SEC, DIR, and Secy. of Treas.)	(654)
6/20/69	Trustee's Plan of Reorganization, etc. filed	(661)
6/23/69	Before Mishler, J. - Hearing held. Motion by the trustee to amend the notice of hearing on the proposed plan of reorganization relating to consolidation of the debtors. Motion granted. Order signed.	
6/23/69	By Mishler, Ch.J. - Order filed that the notice of hearing under Sec. 169 of the Act etc. (Exhibit "B"), be amended so as to include notice to creditors and stockholders of the debtors, etc.	(662)
6/15/70	Trustee's Amended Plan of Reorganization filed (copies mailed to S.T., D.I.R. and S.E.C.)	(754)

RELEVANT DOCKET ENTRIES
RE: CONTINENTAL VENDING MACHINE CORP.

5/20/71	By Mishler, Ch.J. - Order filed that the Trustee's Amended Plan of Reorganization for Continental and Apco, as filed by Trustee of said Debtors be approved, etc. * * * and that September 1, 1971 be fixed as the last day in which creditors affected by Plan may accept same, etc.	(820)
12/10/71	By Mishler, Ch.J. - Order filed that January 21, 1972 at 2:00 P.M. is fixed as date and time (a) of a hearing to consider the confirmation of the Trustee's Amended Plan of Reorganization of debtors, etc. * * *	(849)
1/14/72	Objection of James Talcott, Inc. to confirmation of the Trustee's Amended Plan of Reorganization filed.	(854)
1/21/72	Before Mishler, Ch.J. - Hearing on confirmation of plan, etc. Case called. Hearing held. Hearing concluded. Decision reserved.	
3/2/72	Memorandum of Trustee in support of confirmation of trustee's Amended Plan of Reorganization and in answer to objections of confirmation of James Talcott, Inc. filed.	(861)
5/15/72	Reply Memorandum of James Talcott, Inc., in Support of its Objections to the Confirmation of the Trustee's Amended Plan of Reorganization filed.	(868)
6/30/72	Reply Memorandum of Trustee in Support of Confirmation of Trustee's Amended Plan of Reorganization and in Answer to Objections of Confirmation of James Talcott, Inc. filed.	(870)
6/30/72	Memorandum of James Talcott, Inc. in Support of its Objection to the Confirmation of the Trustee's Amended Plan of Reorganization filed.	(871)
9/20/72	Rebuttal Memorandum of James Talcott, Inc., in support of its objection to the Confirmation of the Trustee's Amended Plan of Reorganization filed by Hahn, Hessen, Margolis & Ryan, Attys.	(880)
8/12/74	By Mishler, Ch.J. - Order confirming Amended Plan filed. Talcott's objections to the amended plan are overruled. The court is satisfied that the plan meets the requirements of Sec. 221. The Amended Plan dated May 20, 1971 is confirmed, and it is SO ORDERED.	(970)

RELEVANT DOCKET ENTRIES
RE: CONTINENTAL VENDING MACHINE CORP.

9/6/74	Notice of Appeal filed. (Hahn, Hessen, etc. from order of Mishler, Ch.J. - August 12, 1974.)	(975)

RELEVANT DOCKET ENTRIES
RE: CONTINENTAL APCO, INC.

10/4/63	Creditors' Petition for Reorganization pursuant to Chapter X - Sec. 127 filed.	(1)
10/10/63	By Mishler, J. - Order filed appointing Trustees; that within (5) days said Trustees shall qualify by filing a rider to a bond to the U.S.A. in the sum of $50,000.00 and setting case down for hearing before Judge Mishler at 9:30 A.M. on December 6, 1963, etc.	(5)
12/6/63	Before Mishler, J. - Hearing on objections to retention of said named Trustee, etc. Hearing held and concluded - appointment of Trustees confirmed. * * *	
2/10/64	By Mishler, J. - Order filed making appointment of Trustees permanent and that the bonds heretofore filed for temporary trustees shall be continued as the bonds of said permanent trustees.	(29)
9/4/64	Application of John P. Campbell for resignation as Trustee filed (Filed in 63-B-663)	
9/14/64	By Mishler, J. - Order filed that the resignation of John P. Campbell, trustee, is hereby accepted; effective as of date of this order; further ordered that Irving L. Wharton be continued as sole trustee, etc.; further ordered that John P. Campbell and continuing trustee take necessary steps to effect said resignation, etc. (Filed in 63-B-663, #232).	

(Note - Nearly all subsequent entries are duplicates of entries in Continental Vending Machine Corp. and the entered documents are stated to be filed in the latter proceeding.)

TRUSTEE'S REPORT PURSUANT TO SECTION 167(5) OF THE BANKRUPTCY ACT, FILED JUNE 13, 1969

(P. 39) X. RECOMMENDATION AS TO CONTINUANCE OF BUSINESS AND REORGANIZATION OF THE DEBTORS

Based upon the Trustee's investigation, and the foregoing report, it is clear that there is no longer any business of the debtors to be reorganized. Nevertheless, a plan of reorganization which would pro- (p.40) vide for the continued and orderly liquidation of the debtors' assets, and payment of the proceeds therefrom to creditors is a far more desirable alternative than an adjudication of the debtors as bankrupts under Chapters I through VII of the Act. It is the Trustee's intention to propose such a plan. It is clear that the debtors were operated as a single economic unit with little or no attention paid to the needs of Apco or to Continental's other subsidiaries. Any plan of reorganization which is proposed for said debtors should provide for a merger of the assets and liabilities of the debtors and a consolidation of the within proceedings.

TRUSTEE'S PLAN OF REORGANIZATION FOR
CONTINENTAL VENDING MACHINE CORP. AND CONTINENTAL APCO, INC.
FILED JUNE 20, 1969

ARTICLE I

DEFINITIONS

The following terms when used herein, unless the context otherwise requires, shall have the following meanings, respectively:

ADMINISTRATION EXPENSES: All costs and expenses of administration arising out of the within proceedings and the Conservatorship of Continental, including without limitation, final and interim allowances with respect to the within proceedings or any other proceedings under the Bankruptcy Act in which the above captioned corporations are debtors, which may be confirmed, approved or made by any court, Judge, Referee, Special Master or any other such officer, acting in these or any other proceedings under the Bankruptcy Act in which said corporations are debtors, duly authorized to confirm, approve or make such allowances.

APCO REORGANIZATION PROCEEDINGS: The proceedings for the reorganization of Continental Apco Inc. under Chapter X of the Bankruptcy Act, commenced by the filing of an involuntary petition on October 4, 1963, which petition was approved by the Court on October 10, 1963.

APPROVAL OF THE PLAN: The entry by the Court of an order approving the Plan in accordance with Chapter X of the Bankruptcy Act.

TRUSTEE'S PLAN OF REORGANIZATION FOR
CONTINENTAL VENDING MACHINE CORP. AND CONTINENTAL APCO, INC.
FILED JUNE 20, 1969

CHAPTER X: Chapter X of the Acts of Congress relating to Bankruptcy.

CHAPTER X PETITIONS: The petitions filed on July 10, 1963, and October 4, 1963, initiating the within proceedings in respect of Continental Vending Machine Corp. ("Continental"), and Continental Apco, Inc. ("Apco"), respectively, under Chapter X of the Bankruptcy Act.

CLAIMS: Claims shall mean all claims against both of the Debtors, Continental and Apco, which are treated herein on a consolidated basis, or their property, liquidated or unliquidated, fixed or contingent, which arose prior to the filing of the Chapter X petitions and which have been or shall be allowed, or if not so filed or allowed have been or hereafter are listed by the Trustee as liquidated in amount and not disputed, but shall not include any inter-company Claims of Continental, Apco, or their subsidiary or affiliated corporations.

COMMON STOCK: The $.10 par value Common Stock of Continental.

CONFIRMATION OF THE PLAN: The entry by the Court of an order confirming the Plan in accordance with Chapter X of the Bankruptcy Act.

CONSERVATOR: John P. Campbell, Conservator of the assets and properties of Continental, appointed by order of the

United States District Court for the Southern District of New York on April 8, 1963.

CONSERVATORSHIP: The period commencing April 8, 1963, and ending July 10, 1963, during which period the Conservator acted as an equity receiver of Continental, and its assets and properties.

CONSUMMATION OF THE PLAN: The completion of all acts necessary to effect the provisions of the Plan.

CONTINENTAL REORGANIZATION PROCEEDINGS: The proceedings for the reorganization of Continental under Chapter X, commenced by the filing of an involuntary petition on July 10, 1963, which petition was approved by the Court on July 12, 1963.

COURT: The District Court of the United States for the Eastern District of New York acting in the Reorganization Proceedings of the Debtors and the Judge of that Court or any Referee in Bankruptcy at the time in charge of or hearing any part of the Reorganization Proceedings.

CREDITOR: The holder of a Claim.

DEBENTURES: The 6% convertible subordinated debentures of Continental Vending Machine Corp. due September 1, 1976, bearing interest from December 21, 1961.

DEBENTURE HOLDERS: Holders of Debentures.

TRUSTEE'S PLAN OF REORGANIZATION FOR
CONTINENTAL VENDING MACHINE CORP. AND CONTINENTAL APCO, INC.
FILED JUNE 20, 1969

DEBTORS: Continental Vending Machine Corp., an Indiana corporation, and Continental Apco, Inc., a New York corporation.

EFFECTIVE DATE OF THE PLAN: The date the Plan is declared by the Judge to have been substantially consummated under the provisions of subdivision a of Section 229 of the Bankruptcy Act.

EXECUTORY CONTRACTS: All executory contracts of the Debtors, including without limitation, any and all franchise or license agreements or arrangements, lease or sub-lease agreements, personal property financing agreements, mortgage lending agreements, conditional sales agreements, equipment lease agreements, and lease-license arrangements.

FIXED ASSETS: Fixed assets shall include real, personal and mixed property of any nature and description.

INSOLVENT: A corporation shall be deemed insolvent whenever the aggregate of its Properties, exclusive of any Property it may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder, or delay its creditors, shall not, at a fair valuation be sufficient in amount to pay its debts.

PLAN: This Plan of Reorganization.

PRIORITY CREDITORS: Holders of Claims for Administration Expenses and Claims for wages entitled to priority under

Section 64a of the Bankruptcy Act, for taxes and for non-tax debts entitled to priority under the laws of the United States, or who would otherwise be entitled to priority under Section 64a of the Bankruptcy Act.

PROPERTIES: All assets of the Debtors, Continental and Apco, and their subsidiary and affiliated corporations, on a consolidated basis, including without limitation, cash, general and specific deposits, accounts receivable, notes, bonds, other evidences of indebtedness or securities, claims, causes of action, and all other property or assets, whether tangible or intangible, real, personal or mixed, of every kind, nature and description, owned by the Debtors.

REORGANIZATION PROCEEDINGS: The within proceedings for reorganization of the Debtors under Chapter X of the Bankruptcy Act which were initiated against Continental and Apco on July 10, 1963, and October 4, 1963, respectively.

SEC: Securities and Exchange Commission.

SECURED CREDITORS: The holders of all Claims filed and allowed which are secured in whole or in part by valid liens on any property of the Debtors in the possession of the Trustee.

SENIOR CREDITORS: Those Creditors, including the Franklin National Bank, to whom payments of principal, interest and premiums on the Debentures are expressly subordinated pur-

suant to the terms of the Indenture of Trust dated as of September 1, 1961.

STOCKHOLDERS: Holders of the shares of Continental Common Stock.

TRUSTEE: Irving L. Wharton, Esq., of 31-16 Steinway Street, Long Island City, New York 11103, as successor to John P. Campbell and Irving L. Wharton, co-Trustees in Reorganization of the Debtors, John P. Campbell having resigned with Court approval on September 14, 1964.

TRUSTEES: John P. Campbell and Irving L. Wharton, co-Trustees in Reorganization of the Debtors until September 14, 1964, the effective date of resignation by John P. Campbell, as a trustee.

UNSECURED CREDITORS: Holders of Claims who have filed Claims in these proceedings, and Creditors who have not filed Claims, other than Secured Creditors and Priority Creditors, including holders of Claims arising out of the rejection of Executory Contracts herein provided for, and Debenture Holders.

ARTICLE II

PROPERTY TO BE DEALT WITH BY THE PLAN

All Properties of Continental, Apco, Coast Automatic Vending Corp., Continental Apco of Canada, Ltd., and any of their subsidiary or affiliated corporations and their Trustee will be

dealt with by the Plan, on the basis of a merger or consolidation thereof.

ARTICLE III

CLASSIFICATION OF CREDITORS

For the purposes of the Plan and its acceptance, Creditors and Stockholders are hereby divided into the following classes, subject to such other classification as the Court may direct.

Class 1: ADMINISTRATION EXPENSES.

Class 2: CLAIMS FOR WAGES, SALARIES & COMMISSIONS. Claims of any employees of the Debtors, excluding officers or directors of either of the Debtors, for wages, salaries or commissions, not to exceed $600 with respect to each claimant, which have been earned within three months prior to the commencement of the respective Reorganization Proceedings.

Class 3: UNITED STATES PRIORITY TAX CLAIMS. Claims of the United States of America for taxes or otherwise, which Claims have been duly filed and allowed by the Court.

Class 4: CLAIMS OF OTHER PRIORITY CREDITORS. Claims of Creditors who would be entitled to priority under Section 64a of the Bankruptcy Act, exclusive of Creditors in Class 3, to the extent that they are duly filed and allowed by the Court.

Class 5: SECURED CREDITORS.

Class 6: TRUST FUND CREDITORS. Certain unsecured creditors of the vending machine routes of Continental located in the cities of Hammond, Indiana and Detroit, Michigan, whose claims arose prior to September 30, 1962, and only to the extent that the proceeds of the sales of the assets of these routes exceed the Claims of Secured Creditors of said routes, as provided in the decision of the United States Court of Appeals for the Second Circuit reported as AUTOMATIC CANTEEN COMPANY OF AMERICA v. WHARTON, 358 F. 2d 589 (2nd Cir., 1966).

Class 7: SENIOR CREDITORS.

Class 8: GENERAL UNSECURED CREDITORS. Any Claims, other than Claims based on the Debentures, to the extent not included in Classes 2, 3, 4, 6 and 7.

Class 9: DEBENTURE HOLDERS, to the extent that their Claims are duly filed and allowed by the Court.

Class 10: STOCKHOLDERS.

ARTICLE IV

A. PROVISIONS FOR THE PAYMENTS OF ADMINISTRATION EXPENSES AND TREATMENT OF OTHER CLASSES OF CREDITORS.

The following payments will be made in cash in the order of priority set forth below and as may be directed by an order of the Court to the extent that funds are available after the payments made as required under Paragraph B of this Article IV.

1. Creditors in Class 1, without any interest thereon.

2. Creditors in Class 2, without any interest thereon.

3. Creditors in Class 3, without any interest thereon.

4. Creditors in Class 4, without any interest thereon.

5. Creditors in Classes 7, 8 and 9 shall receive payment as hereinafter provided in paragraph C of this Article IV.

B. PROVISIONS FOR THE PAYMENT OF SECURED AND CERTAIN UNSECURED CREDITORS.

The following payments will be made in the order of priority set forth below and as may be directed by an order of the Court.

1. Creditors in Class 5, to the extent that their Claims are secured by specific liens against Property of the Debtors and the proceeds of the sale of such liened Property (the "Proceeds") are sufficient to satisfy their liens, after deduction of so much of the Administration Expenses as the Court may determine should be paid from such Proceeds, with such interest thereon as may be allowed by the Court; or if sufficient Proceeds are not available, Creditors in Class 5 shall become Creditors in Class 8 to the extent that their Claims as Creditors in Class 5 remain unsatisfied. To the extent that any Creditor in Class 5 holds security on more than one such separate asset, the Court shall apply the equitable doctrine of marshalling.

2. Creditors in Class 6, from the Proceeds of the

sale of Properties of the Debtors located in Hammond, Indiana and Detroit, Michigan, to the extent that there remains, after payment of Claims of Creditors in Class 5 who are entitled to share in the Proceeds of sale of such Property, any excess of Proceeds therefrom; or if such excess shall be insufficient to satisfy the Claims of Creditors in Class 6, they shall become Creditors in Class 8 to the extent that their Claims as Creditors in Class 6 remain unsatisfied.

C. PROVISIONS FOR PAYMENT OF SENIOR CREDITORS, GENERAL UNSECURED CREDITORS AND DEBENTURE HOLDERS.

1. INTRODUCTION. The Indenture of Trust, dated as of September 1, 1961, subordinates the right of holders of the Debentures to receive payment thereon, in the event, among other events, of the dissolution, winding-up, or liquidation of Continental, to the rights of Senior Creditors, among others. In effect, the subordination of Debenture Holders constitutes an equitable assignment of their Claims to the Senior Creditors until the Claims of the Senior Creditors are paid in full. Based upon the present financial condition of the Debtors, there is little or no likelihood that the Debenture Holders will receive any distribution if the subordination provisions of the Indenture of Trust are enforced. The Indenture Trustee, Franklin National Bank, is a Senior Creditor and has filed a claim against the Debtors in the amount of $2,374,350.77.

2. THE AGREEMENT. The Indenture Trustee, Franklin

National Bank, proposes to pay to the Trustee, upon confirmation of the Plan, the sum of $500,000 for distribution to the Creditors in Class 9 whose Claims are duly filed or listed, and allowed by the Court (the "Debenture Fund"). After a determination by the Court as to the allowability of the Claims of all Creditors in Class 9, the Trustee shall distribute to the Creditors in Class 9, whose claims are duly filed or listed and allowed, their ratable share of the Debenture Fund. The Franklin National Bank shall waive any and all of its subordination rights under the Indenture of Trust with respect to payments on the Debentures, including any sums payable from the Debenture Fund, to the Creditors in Class 9 who shall accept any distribution from the Debenture Fund and including its right to receive payment of any other sums which may be paid or distributed to such accepting Creditors of Class 9 pursuant to the provisions of the Plan; provided, however, that Creditors in Class 9 shall not be entitled to receive any distribution (other than a distribution from the Debenture Fund) from the Debtors' consolidated estates, unless and until the following occurs: the amount distributed to Creditors in Classes 7 and 8 constitutes a percentage of the total amount of their Claims, which is equal to the percentage derived by dividing the amount of the Debenture Fund by the total amount of Claims of Creditors in Class 9 duly filed or listed and allowed by the Court. From and after the occurrence of such event, all Creditors in Classes 7, 8 and 9 shall share ratably in any additional distributions to be made. The Debtors and Franklin National Bank have claims against

Valley Commercial Corp., a New York corporation ("Valley"), and its assets. One of the assets of Valley is a tax refund claim against the Internal Revenue Service. As part of the agreement hereinbefore set forth in subparagraph 2 of Paragraph C of this Article IV, and subject to the terms and conditions thereof, Debtors and their Trustee agree to release any claims they may have to proceeds which may be paid to Valley as a result of its tax refund claim; and Franklin National Bank agrees that its claim against the Debtors in the amount of $2,314,350.77 shall be reduced to $1,700,000; and its claim as a Creditor in Class 7 shall be allowed in that amount, and dividends paid to it shall be computed on that amount.

Distributions from the Debenture Fund made pursuant to subparagraph 2 of Paragraph C of this Article IV must be deposited and cleared within 60 days from the date of distribution. In the event that such distributions are not deposited and cleared within such 60 day period, the Trustee shall stop payment of all such outstanding checks and the amount represented thereby shall be remitted to the Indenture Trustee, Franklin National Bank.

D. STOCKHOLDERS.

Each of the Debtors is insolvent and no provision is therefore made for Stockholders of Continental; and such Stockholders will not participate in the Plan.

ARTICLE V

MEANS FOR EXECUTION OF THE PLAN

1. After confirmation of the Plan, the Plan shall be consummated by the Trustee under the supervision of the Court. Any assets of the Debtors, taken on a consolidated basis, not in the form of cash and now held by the Trustee, including without limitation, any claims, causes of action and any amounts due Debtors under the Contract with the Vendo Company, dated July 31, 1964, with such additions or diminutions thereto prior to the Consummation of the Plan as may result from: (1) current operation of the estates of the Debtors; (2) disposition by the Trustee of non-operating assets of Debtors not subject to specific liens and with Court approval; (3) payments on Account for Administration Expenses; and (4) reservation of funds for the payment of allowances in the Reorganization Proceedings and all Claims to be paid in cash hereunder and for other purposes approved by the Court, shall be liquidated by the Trustee and reduced to cash as soon as it is practicable.

2. To the extent that cash is available upon confirmation of the Plan, and to the extent that additional cash becomes available through the reduction to cash of all other Properties of the Debtors, distribution shall be made in accordance with the directions of the Court and Article IV of the Plan. The receipt of and acceptance by any Debenture Holder of his pro-rata share of the Debenture Fund shall constitute a release and discharge of

any and all Claims which said Debenture Holder may have against the Indenture Trustee, Franklin National Bank, whether or not such Debenture Holder has executed and filed an acceptance of the Plan.

3. The form of acceptance of the Plan by the Creditors in Class 9 shall provide that the execution and delivery thereof shall not only be deemed a consent to and approval of the Plan, but shall also release and discharge the Indenture Trustee from any and all claims, rights and causes of action which such accepting Creditor may have against the Indenture Trustee.

4. When the Plan has been fully consummated and the Trustee has exhausted his efforts to liquidate or otherwise dispose of any Properties of the Debtors, then the Trustee shall cause the dissolution of the Debtor corporations and their subsidiaries in accordance with applicable local law.

ARTICLE VI

PROVISIONS FOR RETENTION, ENFORCEMENT, SETTLEMENT OR ADJUSTMENT OF CLAIMS BELONGING TO THE DEBTORS OR TO THE TRUSTEE.

All claims in favor of the Debtors or their estates, whether adjusted in the Reorganization Proceedings or in the process of liquidation, or in connection with the consummation of this Plan, or not settled and pending as of the date of the Consummation of the Plan, and any other causes of action in favor of the Debtors (or their Trustee) shall be retained and enforced by

the Trustee, and the defense of all claims against the Debtors or their estates which have not been finally allowed or disallowed shall likewise be retained by the Trustee, unless the Court shall otherwise direct. The Trustee shall have full power to prosecute and defend any and all pending actions and any proceedings involving such claims, and, subject to the approval of the Court, to bring or to continue any action or proceeding by way of summary proceeding or otherwise, and may conduct any further investigation or examination of witnesses that may be required. The Trustee shall not, however, have any power to discontinue, compromise or settle any action or proceeding or to sell or dispose of any asset of the Debtors' consolidated estate without the express approval of the Court, and upon such notice as the Court may deem appropriate under the circumstances. The Trustee may use the services of his attorneys and accountants in the prosecution or defense of such actions and proceedings, and shall have the full power, subject to the approval of the Court, to employ, retain or replace attorneys or counsel representing him in any action or proceeding. The Court shall, from time to time, fix reasonable compensation to be paid to the Trustee, his attorneys and accountants and other interested parties for services in such further investigations and in prosecution and defense of any claims, actions or proceedings under this Article, and the Court shall determine the manner in which payment thereof shall be made. The Trustee may reserve a sum in such amount as the Court may direct for the purpose of defraying expenses of the investigation, prosecution of defense

of such claims, actions or proceedings.

The Court shall retain jurisdiction of the proceeds of the sale of any property of the Debtors and of any of the cash now held in the estates of the Debtors or by the Trustee, and over all parties who have appeared in the Reorganization Proceedings, for the purpose of determining all claims or objections involving the Debtors, their respective estates, or the Trustee.

ARTICLE VII

PROCEDURE WITH RESPECT TO CLAIMS TO WHICH OBJECTIONS ARE FILED.

In the event that objection has been or may hereafter be made to any Claim, and such objection shall not have been finally determined at the time the Plan is consummated, then, unless the Court shall otherwise direct, there shall be reserved by the Trustee such an amount in cash as such claimant would have been entitled to under the Plan if such Claim had been allowed as filed. Upon the determination of such objection as shall have been made to such Claim, any cash to which such claimant is entitled under this Plan shall be paid and distributed to such claimant out of such reserved cash in the manner that the Court may direct. To the extent that said cash reserve is not required for the distribution and payment to such claimant, it shall be disposed of in such manner as the Court may direct.

ARTICLE VIII

RETENTION OF JURISDICTION.

The Court shall retain jurisdiction of the proceeds of the sale of any Properties and of the cash, Treasury notes or certificates of deposits or other property now held in the estates of the Debtors (on a consolidated basis) or by the Trustee. The Court will also retain jurisdiction of all pending litigation, which will be continued in the name of the Trustee, and over all parties who have appeared in these proceedings, for the purpose of determining all present and future claims or objections involving the Debtors, the consolidated estates of the Debtors or the Trustee, for the purposes of carrying the provisions of Article VI into effect.

ARTICLE IX

DISPOSITION OF PROCEEDS OF SALE AND OTHER ASSETS HELD BY TRUSTEE.

1. After Consummation of the Plan, any assets in the hands of the Trustee not in the form of cash will be liquidated and reduced to cash, subject to Court approval.

2. The Trustee shall pay in cash all the expenses of the Conservator, the Reorganization Proceedings and the Plan and its consummation, and all Administration Expenses, including without limitation, compensation, fees, disbursements, and other allowances made or to be made by the Court to such parties as the Court may deem to be entitled thereto.

3. The Trustee shall pay in full the Claims to the extent allowed of Classes 1 to 9, inclusive, according to the treatment of the Claims as set forth in Article IV as and when funds are or become available.

ARTICLE X

CREDITORS AFFECTED BY THE PLAN.

Creditors in Classes 7, 8 and 9 are deemed to be affected by the Plan.

ARTICLE XI

PROVISIONS FOR CLASSES OR CREDITORS WHICH ARE AFFECTED BY AND DO NOT ACCEPT THE PLAN BY THE REQUISITE MAJORITY.

In respect of any class of Creditors which is affected by and does not accept the Plan by the two-thirds majority in amount required under Chapter X of the Bankruptcy Act, adequate protection for the realization by them of the value of their Claims against the property dealt with by the Plan and affected by such Claims, shall be provided in the order confirming the Plan by any one or more of the methods prescribed by Section 216(7) of said Act.

ARTICLE XII

APPROVAL, ACCEPTANCE, CONFIRMATION AND CONSUMMATION OF THE PLAN.

The Plan shall be approved, accepted, confirmed and consummated in accordance with the provisions of Chapter X of the Bankruptcy Act and the orders of the Court made and entered in accordance therewith.

ARTICLE XIII

RELEASE AND DISCHARGE.

The Confirmation of the Plan shall be deemed to release and discharge the Indenture Trustee, Franklin National Bank, from any and all liability and causes of action, suits, debts, accounts, contracts, agreements, claims and demands, in law or in equity, in favor of the Trustee or the Debtors' estates, and the Debenture Holders, whether claiming through the Trustee or the Debtors or otherwise.

ARTICLE XIV

MODIFICATION OF THE PLAN.

The Plan may be modified or amended as provided in Chapter X of the Bankruptcy Act, as amended.

ARTICLE XV

CONSTRUCTION OF THE PLAN.

The Trustee with the approval of the Court may, insofar as it does not materially and adversely affect the interest of any Creditors or the Debtors' consolidated estates, supply any defect or omission and reconcile any inconsistency in the Plan in such manner and to such extent as, in his opinion, may be necessary.

ARTICLE XVI

MISCELLANEOUS.

The statements contained in the Plan have been prepared from sources believed to be reliable. None of the statements is to be considered as a representation or as a condition of acceptance of the Plan.

The classification of Creditors in the Plan and all statements contained herein as to the classifications of Claims of Creditors are conditioned upon the Consummation of the Plan. If the Plan is not consummated, such classifications, statements and proposed treatment shall not be binding upon the Debtors or the Trustee and shall be without prejudice to the rights of any party in interest and of the Trustee. No statement herein contained shall be deemed to be an admission as to the relative rights or interest of any Creditor.

* * * *

7. Said reports incorporated applicant's recommendation that any plan of reorganization which is proposed for the debtors should provide for a merger of the assets and liabilities of the debtors and a consolidation of the within proceedings. The bases for applicant's recommendation are that (a) the subsidiary, Apco, had, in fact, no separate economic existence, was not adequately capitalized, and constituted a mere instrumentality of the parent corporation, i.e., a separate corporate pocket or department of the parent and its business; (b) the operation of the separate entities in reality constituted a single enterprise in an economic sense; (c) that virtually all of the officers and directors of Apco were not independent, were dominated by Harold Roth and acquiesced in the inequitable treatment of Apco and other subsidiaries by Continental; (d) there were numerous transfers of funds in an extremely complex pattern between Apco and Continental which depended wholly on Continental's needs, without any attention paid to the needs of Apco; (e) there were guarantees and cross-guarantees of each other's obligations by the debtors which, in addition to the complex pattern of borrowing transactions between the debtors, makes the task of separating the assets and liabilities of the debtors virtually impossible; (f) there is little, if any, likelihood that an attempt to reconstruct all or a substantial portion of the financial transactions which occurred between the debtors would be successful; and, the cost of such an attempt

might well exceed $1,000,000; and (g) no assurance can be given that such a division could be accomplished, regardless of the amount of money, time and effort which might be expended in such an attempt.

8. On the basis of the foregoing, applicant respectfully submits that a merger of the assets and liabilities of the debtors and a consolidation of the within proceedings will afford interested parties a fair, equitable and feasible solution to the insoluble problems resulting from the indiscriminate manipulation of the debtors, and their finances. Applicant intends to propose a plan of reorganization for the debtors incorporating such a merger and consolidation.

HEARING TRANSCRIPT, AUGUST 6, 1969

(p. 18) MR. MILLER: * * * the trustee has received objections and proposed amendments which go to the issue of consolidation * * * *.

(p. 19) Further, the representatives of James Talcot(t) have raised a question as to the effect of the consolidation in respect to collateral which is now being held by Talcot(t) for Apco. If the consolidation is granted, it is the position of Talcot(t) that the collateral will also serve as collateral for indebtedness for the parent company, Continental Vending Machine Corporation.

HEARING TRANSCRIPT, JUNE 5, 1970

(p. 32) MR. SELIGSON: Now, if your Honor pleases, there is a problem which may arise as a result of the consolidation of Apco and Vending, and I think that problem should be laid bare and dealt with, and not deferred.

In a case, and I would call it a landmark case in the Second Circuit, Chemical Bank versus Kheel, where there was a consolidation which was approved by the Court of Appeals of several corporation --

THE COURT: Do you mean approving a decision by the District Court?

MR. SELIGSON: And in turn approved or affirmed, to be

technically correct -- affirmed by the Court of Appeals.

Well, now, Your Honor, I want to hesitate a minute. It was a Court of Appeals, as I recall, that declared -- that made law in that case -- oh, yes, it was an approval, that is right. It was in affirmance of the District Court because Referee Ryan first held that there should be a consolidation. (p. 33) He was affirmed. And the District Court in turn was affirmed by the Court of Appeals.

The result of the consolidation was to elevate the United States Government to the status of a priority creditor of one corporation which did not have enough money to satisfy the claim, to a priority status with respect to all of the assets.

So the net result was that it was the Government's estate.

THE COURT: You have a different problem, because Apco may have a refund coming.

MR. SELIGSON: Not only with respect to the Government, Your Honor, but there is also a serious problem with respect to the secured claim, that is, Talcott, and I wanted these facts right here on the record.

THE COURT: YES.

MR. SELIGSON: You see, Talcott has a claim or claims that it is a secured creditor of Apco, secured by specific assets

of Apco, but it is also a very substantial unsecured creditor of Vending.

Now, if there is -- and we don't know the facts yet -- but if it develops there is an excess (p. 34) in Apco for the estate and there is a consolidation, Talcott could very well take the position, well, now, we can apply that excess to the Vending indebtedness, and so the excess would not be turned over to the Trustee in Bankruptcy.

Therefore, I think specific provision must be made in this Plan of Reorganization to preclude any such assertion.

THE COURT: How did these secured claims work out? Were these inventories that were mortgaged by Apco?

MR. SELIGSON: Well, Mr. Marcheso can tell us about that.

MR. MARCHESO: Your Honor, the indebtedness between Continental, and Apco, and Talcott came about through the discounting of -- of the factoring of sales, discounting of conditional sales contracts.

And the two accounts, et cetera -- the accounts receivable were all in Apco.

However, I did not know that Professor Seligson was going to bring this up this morning. But I do want to tell the Court that we have recognized this problem for some time. And

quite some time ago we began talking to Talcott to arrange a (p. 35) settlement. And by talking to Talcott I mean Jack Hahn from Hahn, Hessen, Margolis & Ryan.

We are about finished with a proposal which we are going to submit to Talcott for acceptance, which we hope they will accept, which will eliminate this problem.

THE COURT: Let us wait and see then.

MR. SELIGSON: Your Honor, I did not want to inject myself into these negotiations. I knew there were negotiations pending.

But my point is simply this. I think that the plan ought to make it clear that whatever the outcome --

THE COURT: Let's talk about time. When do you think you will know one way or the other?

MR. MARCHESO: Within the next two weeks, Your Honor.

But Professor Seligson is quite right. The plan will have to be amended in some way to give information to everybody as to what is happening with Talcott.

THE COURT: Will you tell me in terms of what is involved?

MR. MARCHESO: Well, the basic question (p. 36) involved, namely, the thrust of the negotiation, is that the estate will be in no different position by consolidation than if it hadn't consolidated at all vis-a-vis James Talcott.

MR. SELIGSON: That is all I want it to provide.

THE COURT: That is what you would like to provide?

MR. SELIGSON: That is the Trustee's plan, and frankly, if this is not going to -- if it doesn't have a provision of that kind, it leaves the matter open so that there can be a controversy afterward.

I wouldn't recommend to the Trustee, if he asks me, to approve the plan.

THE COURT: Well, let us wait and see what happens.

MR. SELIGSON: Why can't we amend the plan, Your Honor, so as to protect the estate and the other creditors? And then if he resolves this question, there is no problem at all one way or the other. We are not concerned with it. You can go right ahead with the approval of the plan.

MR. MARCHESO: Well, what I was hoping, (p. 37) Your Honor, was that we would have resolved this with Mr. Hahn and then just amended the plan to that extent. It appears to me that if we don't resolve this with Talcott, we may have to change our recommendation with regard to the plan of consolidation.

THE COURT: What provision would you like to put in?

MR. SELIGSON: Well, first, on page 2 of the proposed amendments before you, Your Honor, on paragraph 1, I think if we said that paragraph 1 -- amended to read:

"...Creditors in Class 5 to the extent that their claims are secured by specific liens against the property of the debtors and the proceeds of the sale of such lien property (the proceeds) are sufficient to satisfy the particular claim secured by such specific liens..." et cetera, it goes on.

(p. 38) THE COURT: That is specific. And X out "their liens"?

MR. SELIGSON: Beg your pardon?

"To satisfy the particular claims secured by such specific liens," then it goes on, "after deduction of ...." --

THE COURT: And X out "their liens"?

MR. SELIGSON: I am sorry, yes -- yes, Your Honor.

Then I should like to -- in order that there be no question about protecting a secured creditor, on page 137 of the report --

Do you have the plan, Your Honor, the printed plan?

Page 137, Article 2. I should like to add at the end of that sentence, after the word "thereof," a comma, and the words "without prejudice to the rights of secured creditors with respect to specific collateral securing specific indebtedness."

THE COURT: Will you repeat that, Mr. Sulzer?

(Record read)

MR. SELIGSON: Then the definition on page 136 of secured creditors. I should like to amend that to read "The holders of all claims," deleting (p. 39) "filed and allowed" -- and continuing, "which are secured in whole or in part by valid liens on any property of either of the debtors."

It does not make any difference whether the security collateral is in the possession of the Trustee or not, if the creditor is secured he is secured and will be covered by the plan.

Now, I am told there are just a couple of very minor technical changes I need not relate now, Your Honor, but these are the changes I think ought to be brought to the attention of Your Honor and those who are here before we go ahead with testimony.

THE COURT: Are you going to file a further amended plan to incorporate these?

MR. SELIGSON: Yes. I am going to file a plan which embraces all the amendments.

THE COURT: Good enough.

* * * *

(p. 83) MR. ABRAMSON (MR. ABESON): If Your Honor please, I (p. 84) want to ask one question, I have to report to my client and to the firm. A statement was made that negotiations are pending with Mr. Hahn with respect to this Court of Appeals case that gave the Government --

THE COURT: That is with reference to ATCO (APCO) and the claim they have with ATCO (APCO).

Isn't that true?

MR. ABRAMSON (MR. ABESON): You will excuse me, I am not versed in all phases of the case. What has that to do with the plan itself?

Suppose the negotiation does not go through?

MR. SELIGSON: My standpoint, with the amendment of the plan it has nothing to do with it now. Once we amend, whatever the outcome of negotiations, as long as we make it clear that on a consolidation they will not be able to cross over, that is covered. It doesn't make any difference from our standpoint. That can be resolved in litigation.

MR. MARCHESO: There is a litigation pending now against Talcott.

MR. ABRAMSON (MR. ABESON): That is part--the issue that I am talking about is part of it.

(p.85) MR. MARCHESO: No, no.

MR. ABRAMSON (MR. ABESON): What I would like to know is this, at the present status with you about to file your amended plan, as you have stated it, will the plan specifically provide a counter to the Court of Appeals decision that we think is in our favor, and are we foreclosed from objecting to that?

THE COURT: The Court of Appeals permitted the Government to apply--

MR. SELIGSON: Mr. Abramson (Mr. Abeson), let me make this clear, this is a plan of reorganization, this is not simply an application to consolidate.

As part of the plan of reorganization, the trustee has stipulated certain conditions and those conditions are the conditions which are to go in here. They don't write counter to what the Court of Appeals decided because the Court of Appeals was never called on to decide whether or not a plan which provided that there could not be a crossover of liability was correct or appropriate or not.

We are going to provide in this plan that might not be done. If Talcott, as a creditor (p. 86) is not satisfied, they need not accept the plan. If it prefers liquidation, then that is something for them to decide and not for us. But the trustee certainly is not going to submit a plan under which there is any excess collateral obtained from ATCO (APCO) which may be used by Talcott or any other creditors similarly situated, may be used as against an unsecured debt of another corporation.

MR. ABRAMSON (MR. ABESON): In other words, the recourse of Talcott, as with every creditor, will come at the point where the consent is--

MR. SELIGSON: That's right.

MR. ABRAMSON (MR.ABESON): What is the status of the whole proceeding as to objections to the plan?

MR. SELIGSON: There may be an objection at the time of confirmation.

MR. ABRAMSON (MR. ABESON): All right. I understand now.

TRUSTEE'S AMENDED PLAN OF REORGANIZATION,
FILED JUNE 15, 1970 - RELEVANT AMENDMENTS

ARTICLE I - CLAIMS: Claims shall mean all claims against both of the Debtors, Continental and Apco, on their property . . . which, except for the Claims of Secured Creditors, are treated herein on a consolidated basis, . . . but shall not include any inter-company Claims of Continental, Apco, or their subsidiary or affiliated corporations."

ARTICLE II - PROPERTY TO BE DEALT WITH BY THE PLAN: All Properties of Continental, Apco, Coast Automatic Vending Corp., Continental Apco of Canada, Ltd., and any of their subsidiary or affiliated corporations and their Trustee will be dealt with by the Plan, on the basis of a merger or consolidation thereof, with-

out prejudice to the rights of Secured Creditors with respect to specific collateral securing indebtedness.

ARTICLE IV - PROVISIONS FOR THE PAYMENT OF SECURED AND CERTAIN UNSECURED CREDITORS: The following payments will be made in the order of priority set forth below and as may be directed by an order of the Court.

1. Creditors in Class 5, to the extent that their Claims are secured by specific liens against Property of the Debtors and the proceeds of the sale of such liened Property (the "Proceeds") are sufficient to satisfy the particular Claims secured by such specific liens, after the deduction of so much of the Administration Expenses as the Court may determine should be paid from such Proceeds, with such interest thereon as may be allowed by the Court; or if sufficient Proceeds are not available; Creditors in Class 5 shall become creditors in Class 8 to the extent that their Claims as Creditors in Class 5 remain unsatisfied. To the extent that any Creditor in Class 5 holds security on more than one such separate asset, the Court shall apply the equitable doctrine of marshalling. Anything herein contained to the contrary notwithstanding, nothing in the Plan shall be, or be deemed to be an elevation or improvement of the status of a claim filed by any Creditor in Class 5 as a result of the consolidation of the Debtor's Estates.

ORDER APPROVING TRUSTEE'S AMENDED
PLAN OF REORGANIZATION, FILED MAY 20, 1971

* * * * *, this Court

FINDS, DETERMINES, ADJUDGES, AND DECREES THAT:

(1) the aggregate of the property of Continental Vending Machine Corp. and Continental Apco, Inc., Debtors herein, exclusive of any property which they may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or default their respective creditors, is not at a fair valuation sufficient in amount to pay their debts, and the debtors are therefore, insolvent; (Minutes of hearing of September 26, 1969 at pp. 93,94,102, June 5, 1970 at pp.40-53,55).

(2) the stockholders of Continental Vending Machine Corp. ("Continental") and Continental Apco, Inc. ("Apco"), debtors herein, have no claims or interest of any value in either of the debtors, and their rights are not affected by the Amended Plan, and their consents thereto are not required;

(3) Creditors in Classes 7, 8 and 9 are affected by the Amended Plan;

(4) the primary business of the debtors consisted of the manufacture, design, operation, and sale of coin-activated cigar, beverage, and food vending machines, and the operation of music vending equipment;

(5) As of the date hereof, neither Continental nor Apco is operating any viable business; (Minutes of hearing of September

26, 1969 at p.105, June 5, 1970 at pp. 48-63).

(6) All of the former business operations, assets, and properties of the debtors were sold during the pendency of the within proceedings, pursuant to orders of this Court; (Minutes of hearing of September 26, 1969 at p. 105, June 5, 1970 at p. 54).

(7) There remains, as assets of the estates of the debtors, cash, contract claims, accounts receivable, and other choses in action; (Minutes of hearing of June 5, 1970, at p. 48-53 and September 26, 1969 at pp.105-106).

(8) Apco was a wholly owned subsidiary of Continental; the sole function of Apco, from and after December 30, 1960, was the sale and service of machinery and parts manufactured by Continental to the general trade and to other subsidiaries of Continental which operated vending routes; (Minutes of hearing of September 26, 1969 at pp.38-40,45,46).

(9) The members of the boards of directors of the debtors of Continental and Apco were not independent, were dominated by Harold Roth, and were vitually identical; (Minutes of hearing of September 26, 1969 at pp.58,59,98).

(10) The officers of Continental and Apco were not independent, were dominated by Harold Roth, and were virtually identical; (Minutes of hearing of September 26, 1969 at pp.31,58, 59,98).

(11) The officers and directors of Continental and Apco, under the domination and control of Harold Roth, acquiesced in the inequitable treatment of Apco and other subsidiaries of Continental; (Minutes of hearing of September 26, 1969 at pp.45-53, 98).

(12) There were numerous transfers of funds in an extremely complex pattern between Continental and Apco which depended wholly upon Continental's needs, with little or no heed paid to the needs of Apco; (Minutes of hearing of September 26, 1969 at p.10-44, 48-58, 61).

(13) Continental and Apco guaranteed each other's obligations indiscriminately; (Minutes of hearing of September 26, 1969 at pp- 52-54, 56).

(14) Continental and Apco paid certain of each other's obligations; (Minutes of hearing of September 26, 1969 at pp.52-55, 84).

(15) Books and records of Continental and Apco were not maintained in a manner which would permit the accurate reconstruction of all or a substantial portion of the financial transactions between the debtors; (Minutes of hearing of September 16, 1969 at pp. 83-85).

(16) The cost of an attempt to reconstruct the financial transactions between the debtors might well cost $300,000 and no assurance can be given that such a division or accurate reconstruction could be accomplished, regardless of the amount

of money, time and effort which might be expended in such an attempt; (Minutes of hearing of September 26, 1969 at pp. 83, 85-86).

(17) Apco had no separate economic existence from Continental and constituted a mere instrumentality of Continental; (Minutes of hearing of September 26, 1969 at pp. 36-62, 83-84).

(18) The operations of Continental and Apco constituted a single economic enterprise; (Minutes of hearing of September 26, 1969 at pp. 36-62, 83-84).

(19) Apco was inadequately capitalized and was operated as a division or department of Continental and its business; (Minutes of hearing of September 26, 1969 at pp. 36-52,83,84,98).

(20) The assets and liabilities of Continental and Apco should be merged and consolidated in order that creditors of each debtor receive fair, equitable, and feasible treatment;

(21) The Amended Plan offers full protection to interested parties with respect to causes of action available to the debtors' estates by reservation thereof for the benefit of such interested parties;

(22) The Amended Plan complies with the provisions of Section 216 of the Bankruptcy Act; and

(23) The Amended Plan is fair, equitable, and feasible; and it is further

ORDER APPROVING TRUSTEE'S AMENDED PLAN OF REORGANIZATION, FILED MAY 20, 1971

ORDERED that the Trustee's Amended Plan of Reorganization for Continental and Apco, as set forth in Exhibit "A" hereto, prepared and filed by the Trustee of said debtors, be, and it hereby is, approved; * * * * *

OBJECTION OF JAMES TALCOTT, INC. TO CONFIRMATION OF THE TRUSTEE'S AMENDED PLAN OF REORGANIZATION, FILED JANUARY 14, 1972

James Talcott, Inc. (Talcott), a secured creditor of each of the debtors, Continental Vending Machine Corp. (Continental) and Continental Apco, Inc. (Apco), does hereby object to the confirmation of the Trustee's Amended Plan of Reorganization of the said debtors, approved by order of this Court dated May 20, 1971 under Section 174 of the Bankruptcy Act, and specifies the following as the grounds of objection.

1. Some time prior to filings of the petitions initiating the within proceedings under Chapter X of the Bankruptcy Act, Talcott had entered into agreements for financing each of the debtors, pursuant to which Talcott was granted security interests in and to properties of each of the debtors. At the time of filing of the petitions the said agreements were, and they still are, valid and subsisting.

2. On December 4, 1963 an order was entered confirming the validity of Talcott's security and the amounts of the debtors' indebtedness to it as of October 31, 1963.

OBJECTION OF JAMES TALCOTT, INC. TO
CONFIRMATION OF THE TRUSTEE'S AMENDED PLAN OF
REORGANIZATION, FILED JANUARY 14, 1972

3. Talcott proceeded to liquidate its security, and on or about December 31, 1964, as a secured creditor (and as an unsecured creditor for any deficiency), it filed proofs of claim as of November 30, 1964. Thereafter, as a result of continued liquidation of its security, and as of December 31, 1971, Talcott had and has a deficiency of $820,974.79 in its account with Continental and a surplus of $383,332.53 in its account with Apco.

4. On or about December 31, 1964, Talcott also filed its administration claim based on Trustee's Certificates for moneys loaned to the Trustees, Trustee and Conservator herein. As of December 31, 1971, the estate's obligation to Talcott as an administration claimant is $866,487.22.

5. On June 23, 1969, the Trustee filed a plan proposing, among other things, a substantive consolidation. Thereafter, the trustee proposed certain amendments and filed the instant Amended Plan. On May 20, 1971, an order was entered providing for the consolidation sought by the Trustee and approving the Amended Plan on a consolidated basis.

6. The said Amended Plan places secured creditors in Class 5. On information and belief, Talcott is the sole creditor in that class and, as such, it did not accept the Plan.

7. To justify the consolidation, the order contains the following findings: the directors and officers of the two debtors were not independent, were dominated by Harold Roth and

were virtually identical; the directors and officers so dominated and controlled by Roth, acquiesced in the inequitable treatment of Apco and other subsidiaries; transfers of funds in a complex pattern between Continental and Apco, depending wholly on Continental's needs, with little or no heed to Apco's needs; indiscriminate guarantees of each other's obligations; payment of certain of each other's obligations; Continental's and Apco's books and records not maintained in a manner to permit accurate reconstruction of all or a substantial portion of the financial transactions between the two debtors; an attempt to reconstruct the financial transactions between the debtors might cost $300,000 with no assurance that such a division or accurate reconstruction could be accomplished, regardless of the amount of money, time and effort expended in such an attempt; Apco had no separate economic existence from Continental and constituted a mere instrumentality of Continental; the operations of the two debtors constituted a single economic enterprise; inadequate capitalization of Apco, which was operated as a division or department of Continental and its business. Upon these findings, the order concludes that "the assets and liabilities of Continental and Apco should be merged and consolidated in order that creditors of each debtor receive fair, equitable and feasible treatment.

8. Talcott's basic agreements with each of the debtors contain the following identical provisions:

> "You shall be entitled to hold all sums and all property of the undersigned, at any time

> to its credit or in your possession or upon or in which you may have a lien or security interest, as security for any and all obligations of the undersigned at any time owing to you and/or to any company which may now or hereafter be your subsidiary, no matter how or when arising and whether under this or any agreement orotherwise, and including all obligations for purchases made by the undersigned from any other concern factored by you or such subsidiary."

9. Under the consolidation decreed in the order of May 20, 1971, and pursuant to the foregoing provisions in the basic agreements, Talcott is entitled to treat the properties of the two debtors in its possession as one and indistinguishable, and to apply the surplus in its account with Apco against the deficit in its account with Continental.

10. The Amended Plan wouid deprive Talcott of its right to such application of surplus against deficit, by the following provisions: treatment of all claims against the debtors on a consolidated basis, except Talcott's (Article 1 - "Claims"); treatment of all property of the debtor on a consolidated basis, but limiting Talcoet to "specific collateral securing specific indebtedness" (Article II), limiting payment of Talcott's secured claim only out of proceeds of liened property "sufficient to satisfy the particular claims secured by such specific liens" and denying to the status of its secured claim of any "elevation or improvement as a result of the consolidation of the Debtor's Estates" (Article IV - B(1)). The foregoing provisions of the Amended Plan, in full, are annexed hereto.

OBJECTION OF JAMES TALCOTT, INC. TO CONFIRMATION OF THE TRUSTEE'S AMENDED PLAN OF REORGANIZATION, FILED JANUARY 14, 1972

11. The Plan excludes creditors in Class 5, to which Talcott properly belongs, from the classes of creditors affected by the Plan, whereas Talcott as a secured creditor is affected by the Plan and, in violation of Section 216(7) of the Bankruptcy Act, it does not afford the adequate protection provided thereby.

12. By virtue of the foregoing, the Amended Plan is discriminatory as to Talcott, improperly denies it the full realization of its security, to which it is entitled as a result of the consolidation, and hence not fair and equitable within the meaning of Section 221(2) of the Bankruptcy Act, and as to Talcott it fails to comply with the protective provisions of Section 216(7) of the Bankruptcy Act.

HEARING TRANSCRIPT, JANUARY 21, 1972

(P. 5) MR. HAHN:....As your Honor knows, James Talcott, Inc., financed both Continental Vending and Continental Apco, and as of December 31 of 1971 -- I will (p.6) give you the approximate figures -- there is an equity in the account of Apco of approximately $300,000.

THE COURT: As of when was that?

MR. HAHN: Apco has an equity or credit balance of $300,000.

THE COURT: As of the date of the filing of the petition?

MR. HAHN: December 31, 1971.

THE COURT: December 31, 1971?

MR. HAHN: Right; and there is a deficiency in Continental Vending of over $800,000. Now, this is aside from the obligation of the trustee to Talcott on trustee's certificates, which remain unpaid, of approximately $800,000.

THE COURT: Is that in dispute, the amount that's owed?

MR. HAHN: I don't think so because according to the trustee's report it's shown in there at about that figure.

THE COURT: Is that correct?

MR. SELIGSON: There is no dispute.

MR. HAHN: I mention it only to give your Honor the entire picture.

(p.7) Back in 1969 a motion was made -- well, I should say it's a report and a motion by the trustee. The report rendered stated that consolidation was necessary in this particular situation and warranted because of the inter-company relationships and that any plan which might be confirmed would require a prior consolidation of Continental with Apco, and with that report the trustee moved for a hearing on a plan which the trustee himself was submitting.

Now, that plan did not contain any of the features of the amended plan to which Talcott now objects to because it did not discriminate against Talcott, and the estates were going to

be consolidated as to assets and liabilities so far as all creditors were concerned.

When those papers were served upon me, I called the professor, I called Mr. Marcheso and I told him very, very frankly that if that was going to be the position of the trustee, Talcott would apply whatever equities it had in one estate as against any deficiencies it might have against the other. The trustee proceeded at hearings before your Honor over a period of time, (p.8) offering proof on the basis of which your Honor made the findings in the order of approval that these two estates were one, one economic unit. I don't have to review those with you at this point.

A year after the trustee's motion was made, the trustee comes in and files amendments to the plan which, in effect, say yes, there will be a consolidation for everybody but you, Talcott. A secured creditor under this plan may not improve his position by virtue of the consolidation and you may only apply what security you had pledged to you against the specific loan which you made.

Now, in the agreements which Talcott has with both Continental and with Apco there is a provision that Talcott has the right to apply any property which it has in its possession, whether it came into its possession under that particular agreement or any other agreement, no matter how it was acquired, against any obligation of the borrower to it.

* * * *

(p.9) MR. HAHN: In any case, that provision is in both of the agreements, both the master agreements with both Continental and Continental Apco. Now, we take the position, Judge, that, consolidation is an equity power addressed to the (p.10) Court. It is not peculiar to Chapter X. You can have consolidation of two bankrupt estates as well and that if consolidation is necessary here, you cannot order consolidation for everybody but Talcott. If this was one equity (economic) unit and the property of Apco is the property of Continental, then certainly any property of either company that we have under proper agreements can be held and the proceeds applied to any obligation of either company.

THE COURT: I would agree that you would have a constitutional claim of discrimination unless there were a reasonable basis for it, right?

MR. HAHN: All right. We do claim discrimination. We say that the plan discriminates against us. This is one of the grounds for our objection. We say, also, that it violates the absolute priority rule. We say that you are taking by this plan property which the secured creditor holds for the benefit of the unsecured creditors.

THE COURT: What is the difference in dollar and cents between your theory and that of the trustee?

MR. HAHN: On the basis of the figures that I gave you it would be somewhere around (p.11) $300,000, which is less, of course, Judge, than the amount which the trustee claims it would take to pay accountants to unravel the convoluted transactions between the two debtors with doubtful results.

THE COURT: That's a pretty good argument.

MR. HAHN: Now, as to the law, in Chemical Bank against Kheel, decided by our Circuit Court of Appeals three years ago, there were some eleven or twelve debtors in Chapter X. The government had a claim, priority claim, against two of those companies. The government, not the trustee, moved for a consolidation of all eleven and, as a result of that consolidation, which was sustained by the Circuit Court of Appeals, the government's claim attached to the assets of all eleven, whereas if there had been no consolidation, the government would have collected only a small percentage of its claim and collected it in full in denigration of all the claims of unsecured creditors.

Now, that was a case where a motion for consolidation was made before a plan, but I say it doesn't make any difference. The professor has used a plan and a consolidation as part of a (p.12) plan, but if there is a consolidation, it is there for all time, and the findings and the decrees that your Honor made in respect to consolidation don't drift out to sea if this plan is not confirmed; they are still there. These were issues that were

tried before your Honor and I think they are res adjudicata and if your Honor should adjudicate these two debtors, I think a motion to consolidate the two debtors would lie and based upon the same evidence that your Honor heard on the trustee's motion, I would assume that it would be granted.

Now, I think I have put in thumbnail sketch, your Honor, the position of Talcott and I think it gives your Honor something to ponder about. I think we are solid in our position.

THE COURT: Now that you have an idea of what the claim is, Prof. Seligson, would you like to answer it? Or have you learned nothing more than you knew before?

MR. SELIGSON: Your Honor, as I understand it, Talcott's position is two-fold. Number one, it says that by virtue of cross-collateralization agreements, that's quite apart from consolidation (p.13) now, it is entitled to apply a surplus of some $383,000 in the Apco account against what they say is a deficiency of $820 --

THE COURT: Against, as I understand it, all the assets of combined Apco-Vending.

MR. SELIGSON: No, I didn't understand that.

MR. HAHN: That's right. There is no cross-collateralization that we are resting upon, Judge. We have an agreement with Continental which says you can take all of our assets and we say if we have Apco assets, they are Continental's assets by virtue of the consolidation.

MR. SELIGSON: All of what assets?

MR. HAHN: All of the assets of Apco and all the assets of Continental.

THE COURT: Don't you say, Mr. Hahn, that aside from the question of consolidation you have that right anyway by contract?

MR. HAHN: No, we don't say that.

THE COURT: Don't you have that right then?

MR. HAHN: No, because our contracts do not provide that we can hold Apco's property for Continental's debt. We can only hold whatever property we have on Continental for Continental's (p. 14) debt, and in the contract with Apco, we say we can hold all of Apco's property.

THE COURT: You say that the consolidation, in effect, caused an assumption of the obligations of one for the other, right?

MR. HAHN: No, not assumption. It's all one part (pot); not only at the assets side, but at the liabilities side.

MR. SELIGSON: What's the relationship between the contract and the consolidation?

MR. HAHN: Well, if we didn't have that provision in the contract, it might be said this property was never pledged to you.

THE COURT: Oh, really? So you say it's based on contract?

MR. HAHN: That's right.

THE COURT: I have given it a little thought, Mr. Hahn. I think about the little thought I need give it, if that's your

position. I will think of it a little later and probably ponder on it.

MR. HAHN: I think I probably can convince your Honor there is nothing difficult about our position, Judge. We say that Continental's (p.15) assets are Apco's assets. Apco's assets are Continental's assets. Apco's debt is Continental's debt. Continental's debt is Apco's debt.

THE COURT: I will go back to original theories of contract. I will try to recall what my professor told me when I came into class the first day and that is that contract is one of intention, when the parties say it, Mr. Apco sat down and said, "I agree to do such-and-such." He was talking about what Apco agreed to do. He wasn't thinking of a consolidation that might bring Continental's assets into a consolidated or single unit with Apco, nor did Continental contemplate that Apco's assets were going to become part of Continental.

MR. HAHN: It wasn't contemplated in the Kheel case the government would have a claim against the other nine companies' assets either. It isn't contemplated in this case that the Apco creditors who checked Apco are going to share in assets of Continental. Who is to say that the creditors of Continental and Apco who are unsecured here start off exactly even? Somebody is getting the benefit.

(p.16) THE COURT: No. But, you see, your entire premise is based on contract, cross-collateralization agreements. You just say the

effect of the consolidation was to bring each other's assets within the grasp of the other.

MR. HAHN: That's right.

THE COURT: That's all you are saying and, therefore, you could extend your liens to them.

MR. HAHN: Also the debts, sir. I go further than that. I say the debt of Apco becomes the debt of Continental by your Honor's finding. The assets and liabilities are consolidated and merged. There is one pot here.

* * * *

(p.17) THE COURT: I think I understand your position.

Incidently, I will take very seriously any argument you make and I will think very seriously on what you say and I will give Prof. Seligson the opportunity.

MR. HAHN: There is no issue of cross-collateralization in the argument that I have made to your Honor. I didn't mean to, if any such thought occurred.

THE COURT: You can't separate the agreements in your argument, however.

MR. HAHN: I must be able to show your Honor that I have a right to hold this property under contract.

THE COURT: I say you have to start that way.

MR. HAHN: That's right.

(p.18) THE COURT: And that's the trouble with the argument.

MR. HAHN: I don't see that that makes it any weaker, Judge. Take the simple unsecured creditor of Apco. He shipped or he rendered services for Apco. He dealt with Apco all the time. He didn't know Continental existed. He's coming in and sharing with assets of Continental and Apco, as a result of this consolidation.

THE COURT: It's only because the dealings of one were so inextricably bound with the other.

MR. HAHN: That goes for the other.

THE COURT: No. It's very easy to separate them.

MR. HAHN: Because we may have gotten property pledged by one that really belonged to the other. Just as much as the unsecured creditor may have been misled, so could we have been misled. As a matter of fact, I predicted to Mr. Wharton in 1964 that before he was through with this case he would consolidate these two debtors. You might ask him.

MR. SELIGSON: Mr. Hahn, do you claim a lien on any assets of Apco other than the $383,332.53 (p.19) that you have?

MR. HAHN: That's all we have.

MR. SELIGSON: You are not claiming it on any other assets of Apco's?

MR. HAHN: We have no other assets.

MR. SELIGSON: He's not claiming it on all of the Apco assets, your Honor. Just on the assets that they have in their possession.

MR. HAHN: Only what we have in our possession. I can't claim a possessoree lien on something I don't have. Nothing that you have.

MR. SELIGSON: That's what I wanted to get clear because I don't know that that was clear on the record.

Now that I understand it, Mr. Hahn says that Talcott is entitled to a windfall of $383,000 simply because this Court has found that the two corporations for the purposes of this plan and only that -- there has been no separate hearing but only hearings as part of the plan -- that they should be consolidated, the two corporations. I say to you, number one, that the authorities do not support that position because in Kheel vs. Chemical Bank we had a completely (p.20) different situation, with nobody claiming that the government should not take a priority position, which is the position that they finally assumed on the consolidated assets. Here we have a plan which is supposed to be fair and equitable before your Honor can confirm it, and I say to you very bluntly is it fair and equitable to make a gift of $383,000 to Talcott as a result of the consolidation of these cases? I think it answers itself. Obviously it's not.

Now, the question is can you do anything about it. I understand -- I can point out to you, your Honor -- that in the case of Samsel vs. Imperial Pulp and Paper Company the United States Supreme Court made it perfectly clear that this Court decides what the equities are in every case, how claims shall be allowed and whether it's equity or inequitable to allow claims.

THE COURT: Every time an Appellate Court makes that pronouncement it's always subject to what is fair and reasonable and must be supported by substantial evidence. It sounds like granting absolute authority but never is.

MR. SELIGSON: This, your Honcr, is a (p.21) pronouncement that was made by Mr. Justice Douglas in this case that I have referred to: "The power of the Bankruptcy Court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete." And what he's saying is you can't impose conditions on the consolidation of two corporations which would prevent an inequitable result. That's precisely what counsel is saying and I say in the light of this and dozens of cases that you can and should.

THE COURT: If I can, I will.

* * * *

(p.26) THE COURT: Mr. Hahn made a particular charge that he's being treated differently than all the other creditors. I

assume he says that in his brief. Will you treat with that problem?

MR. SELIGSON: I think he's simply saying this. Mr. Hahn happens to be apparently the only -- that is, Talcott happens to be the only creditor that falls into that class. We are saying no secured creditor can improve his position.

MR. HAHN: That's like passing legislation in New York City for cities with a population of (p.27) over two million.

THE COURT: Is it over two million dollars?

MR. SELIGSON: Yes.

That legislation has been upheld.

THE COURT: But in this Court I am charged with the obligation of being fair and equitable.

MR. SELIGSON: That's all I expect you to do, to be fair.

THE COURT: They have the same obligation up in Albany?

MR. SELIGSON: No. I can't say that. I am afraid I can't say that. I agree with that. But Mr. Hahn, you know, it's like saying, "When are you going to stop beating your wife?" He says he's being discriminated against.

MR. HAHN: I say the professor is like the Lord: He giveth and he taketh away.

THE COURT: I wish you gentlemen could have been in Court all day today. I heard them recite the Bible, Hebrew and he thought I understood what he meant and I gave the impression I did.

MR. SELIGSON: I wish that I had, you know, the wisdom of Socrates.

(p.28) THE COURT: You don't need that for me.

MR. SELIGSON: Perhaps the eloquence of Demosthenes.

THE COURT: That would be helpful.

MR. SELIGSON: I am sorry I haven't. So I have to deal with simple words and simple facts, and on the simple facts all I say to you is that how can you, a Judge sitting in a Court of equity, say that as a result of a consolidation it's going to carry along with it, notwithstanding the provision of the plan to the contrary, an unjust enrichment, a windfall of one creditor to the extent of $383,000.

THE COURT: I think the difference is that Mr. Hahn is talking about being fair and equitable to the Talcott Company while you are talking about being fair and equitable to all the creditors.

MR. SELIGSON: That's right.

THE COURT: And that you represent all the creditors and Mr. Hahn represents Talcott.

MR. SELIGSON: He has a very special interest, which I am not critical of it. I often (p.29) represent a special interest. But I don't happen to represent one here.

THE COURT: I might say if you believe the answer is a simple one and requires one page or nothing at all, then don't

submit anything.

MR. SELIGSON: I want to give you a couple of these cases.

THE COURT: I think Mr. Hahn should be commended for the way it was presented. I think the proposition that he submits is clear, his theory is clear. I may eventually agree with it. I could say my off-hand opinion is that I would concur in what you are saying, but to protect the interests of the creditors, if you have any law on it or argument to make, I suggest you submit it.

MR. SELIGSON: Then I will submit that in a memorandum because Mr. Hahn is always clear.

MR. HAHN: May I recall from the Court in the Kheel case where it says -- and this is the language -- it is better to do approximate justice for some than to deny justice for all, even though the government was getting its claim paid in full.

(p.30) THE COURT: That's right.

MR. HAHN: I want to correct the professor in one statement he made to the Court that nobody objected to that. The Chemical Bank objected. They took an appeal to the Circuit Court.

MR. SELIGSON: They didn't object specifically on that ground that the government was going to be elevated, Mr. Hahn.

THE COURT: I may be reading it for the first time. You gentlement can re-read the case and we probably will come to three

different opinions as to what it says, but there is no sense arguing the case now and here. I will just read it. Because of the opinion I have don't be thoroughly discouraged. I have been known to do a flip-flop.

MR. HAHN: I am not discouraged. I know that at first blush it sounds that, oh, Talcott is getting a windfall here, a big grab-bag. It isn't so, because if these two companies were one and people were misled by it, so were we. We were no different than the others, and if the facts that your Honor has found are so, then (p.31) they are so for us as well as for everybody else. That's the inequality which I find so objectionable in the amendments which the professor proposes.

THE COURT: The thing that still bothers me is that if you didn't have the cross-collateralization agreement, you wouldn't have the argument because we are talking about security, we are talking about getting an edge.

MR. HAHN: I have property in my possession.

THE COURT: I understood that was in dispute.

MR. HAHN: No, it isn't.

THE COURT: How many said "yes" here? All who said "yes" please stand up.

Mr. Marcheso, is the agreement that Mr. Hahn refers to being challenged by the trustee?

MR. MARCHESO: The Talcott claim as such --

MR. HAHN: The Judge is asking about the agreement, not the claim.

MR. MARCHESO: Which one?

MR. HAHN: The financing agreement.

THE COURT: The cross-collateralization agreement. I can almost remember the date.

MR. HAHN: December 3rd, 1963, your Honor signed an order which affirmed the validity of (p.32) Talcott's liens based upon these agreements and we had a re-statement of collateral as of October 31 of that year which your Honor likewise confirmed. So it's an order of this Court.

* * * *

(p.35) MR. HAHN: We do not rest our argument on any guaranty of Apco for Continental's debts or Continental for Apco's debts.

THE COURT: Only on the agreement which in fact said that the obligations of Apco are secured not only by the specific assets mentioned but anything else that Apco acquires.

MR. HAHN: Any property of yours which we may hold.

THE COURT: And then Continental made the same agreement as to its assets --

MR. HAHN: Only property which we may hold.

THE COURT: --that were in the possession of Talcott.

MR. HAHN: Yes. A possessoree (y) lien.

MR. MARCHESO: I think what Mr. Hahn is (p.36) saying although I hate to anticipate what I know the lawyer is saying, is that the consolidation itself would give him what he never had before, namely, cross-collateralization vis-a-vis Continental Vending and Apco.

MR. HAHN: It gives that to the unsecured creditors, too, doesn't it?

MR. MARCHESO: I am not criticizing you. I am trying to describe it.

* * * *

(p.71) MR. SELIGSON: I am not sure that we are really talking about an objection to the plan. I think rather we are talking about classification.

THE COURT: But it may affect the amount of distribution.

MR. HAHN: No. I think the professor is wrong. It goes to the very heart of the plan.

THE COURT: No. It takes $300,000 out of the amount of available distribution.

MR. HAHN: But he has to change some of the language in the plan. He says right in his plan: "but it shall not apply." The consolidation shall not apply to the secured creditors.

HEARING TRANSCRIPT, JANUARY 21, 1972

MR. SELIGSON: Wait a minute.

THE COURT: Suppose they disapprove it; the Appellate Court disapproves?

MR. HAHN: Your Honor can ask for the amendment of the plan and your Honor can approve it as amended.

(p.72) THE COURT: I don't think I have to put it on for approval again. Everybody was heard, at least theoretically.

ORDER CONFIRMING TRUSTEE'S AMENDED PLAN OF REORGANIZATION, FILED AUGUST 12, 1974

On June 23, 1969, the Reorganization Trustee filed a consolidated Plan of Reorganization for Continental Vending Machine Corp. (Continental) and Continental Apco (Apco). Subsequently, the plan was amended and, by order dated May 20, 1971, the amended plan was approved by the Court and submitted to the creditors and stockholders for their consideration. A hearing on the confirmation of the plan was held on January 21, 1972. Talcott, a secured creditor of Continental and Apco, has filed an objection to the amended plan on the grounds that (1) the amended plan violates the provisions of §216(7) of the Bankruptcy Act, 11 U.S.C. §616(7), and (2) the amended plan is not fair and equitable to Talcott within the meaning of §221(2) of the Act, 11 U.S.C. §621(2).

Section 221 of the Act provides as follows:

The Judge shall confirm a plan if satisfied that --

(1) the provisions of subchapter VII, section 599, and subchapter X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this title;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Talcott argues that the amended plan does not comply with the provisions of §216 of the Act (Art. 10, subch. X), 11 U.S.C. §616, and thus fails to satisfy the first condition of §221. Section 216 provides in relevant part that:

A plan of reorganization under this chapter --

...

(7) shall provide for any class of creditors which

> is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

Talcott asserts that (1) it is a secured creditor of Apco, (2) it is "affected" by the plan,[/1] (3) as the only member of the class of secured creditors, it does not accept the plan, and (4) the plan fails to provide adequate protection for its security interest.

/1 Section 107 of the Bankruptcy Act, 11 U.S.C. §507, defines creditors who are affected by a reorganization plan as follows:

> Creditors or stockholders or any class thereof shall be deemed to be "affected" by a plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determine whether any creditor or stockholder or class is so affected.

Talcott's argument, as the Trustee points out, is based on the false premise that it holds a security interest in the Apco surplus which is rendered enforceable by consolidation. (Trustee's Memorandum at 28). Talcott contends that at the time of the filing of the Chapter X petition, it held a valid secured lien on the Apco property in its possession. Post-petition liquidation of Talcott's security resulted in full satisfaction of Talcott's claim against Apco and produced a $380,000 surplus. Under the broad language of the security agreement[2], Talcott asserts, it retained a continuing secured lien on this surplus "[u]ntil and unless Talcott should have become satisfied beyond any peradventure of the exhaustion of the remotest possibility of some yet undiscovered obligation subject to the lien, and until a

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[2] Talcott's security agreements with Continental and with Apco contained the following identical provisions:

> You shall be entitled to hold all sums and all property of the undersigned, at any time to its credit or in your possession or upon or in which you may have a lien or security interest, as security for any and all obligations of the undersigned at any time owing to you and/or to any company which may now or hereafter be your subsidiary, no matter how or when arising and whether under this or any agreement or otherwise, and including all obligations for purchases made by you or such subsidiary.

final striking of the balances in its numerous accounts with the debtors..." (Talcott's Reply Memorandum at 4). Upon consolidation, the liabilities of Apco and Continental would be merged, thereby entitling Talcott to apply its Apco lien against the $820,000 Continental deficiency.

The absence for a period of time of an underlying debt did not, Talcott contends, in any way impair its lien. Citing In re Cichanowicz, 226 F. Supp. 288, 291 (E.D.N.Y. 1964), Talcott argues that the "validity of a lien does not depend upon the existence of a contemporaneous debt, if the parties so agreed." (Talcott's Reply Memorandum at 5). Cichanowicz simply stands for the proposition that a mortgage can be revived to secure debts incurred after the original indebtedness is discharged if the parties expressly or impliedly agree on this result. The court finds no authority in Cichanowicz for imposing a lien on surplus remaining after the application of collateral to a secured debt. The security agreement between Talcott and Apco, although broad, cannot be interpreted as creating such a lien. Moreover, Talcott's position is contrary to the long-established, basic principle that "[i]n the absence of an obligation to be secured there can be no lien." United States v. Phillips, 267 F. 2d 374, 377 (5th Cir. 1959). In Phillips, the court clearly stated the applicable rule as follows:

> A lien is a charge upon property for the payment or discharge of a debt. It is therefore dependent upon the existence, the amount of, and the provability of the debt. If the debt has been paid or otherwise expunged as for fraud or by set-off, the lien is extinguished.

Id. at 376-77.

The court finds, therefore, that Talcott is simply an unsecured creditor as to the Continental deficiency, and that, as such, his rights are fully protected by the consolidation plan.

Talcott also challenges the amended plan on the ground that it is unfair and inequitable and therefore violates §221(2) of the Act. Citing Chemical Bank New York v. Kheel, 369 F. 2d 845 (2d Cir. 1966), Talcott argues that as a "necessary consequence" of consolidation, it had the right to apply the Apco surplus against the Continental deficiency and that the amended plan, by limiting secured creditors to "specific collateral securing specific indebtedness," deprived it of that right.

Here again, Talcott's argument is premised upon the existence of a valid security interest in the Apco surplus. As discussed above, such a premise is unsupported by either accepted rules of law or by the terms of the security agreement itself. Moreover, Talcott's reliance on Kheel is misplaced. In Kheel, Chemical Bank, a secured creditor of one of the bankrupt corporations, opposed a motion by the United States to consolidate

chapter X proceedings with respect to eight corporations owned and controlled by one Kulukundis. The court approved the consolidation, but cautioned that:

> The power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others. Yet in the rare case such as this, where the interrelationships of the group are hopelessly obscured and the time and expense necessary even to attempt to unscramble them so substantial as to threaten the realization of any net assets for all the creditors, equity is not helpless to reach a rough approximation of justice to some rather than deny any to all.

369 F. 2d at 847. Judge Friendly, while concurring with the result reached by the majority, noted in a separate opinion his misgivings as to the elevated status which consolidation would confer on the Government's statutory lien:

> Equality among creditors who have lawfully bargained for different treatment is not equity but its opposite, and the argument for equality has a specially hollow ring when made by the United States whose priority over other creditors will necessarily be enhanced by having the assets of all these corporations thrown into hotchpot.

369 F. 2d at 848.

In the instant case, Talcott, as a secured creditor of Continental, received exactly the treatment for which it bargained. To allow Talcott to apply the Apco surplus to the remaining Continental deficiency through the fictional secured creditor status which Talcott now advances would be to give

it considerably more than what it bargained for, to the prejudice and detriment of the other unsecured creditors. If there were no consolidation, Talcott would clearly be an unsecured creditor of Continental as to the amount owing after liquidation of its security. Consolidation under the amended plan will leave Talcott as an unsecured creditor as to the Continental deficiency. Accordingly, the court finds that the amended plan is "fair and equitable" and satisfies the condition imposed by §221(2) of the Act.

Talcott's objections to the amended plan are overruled. The court is satisfied that the plan meets the requirements of §221. The amended plan dated May 20, 1971 is confirmed and it is

SO ORDERED.

NOTICE OF APPEAL, FILED SEPTEMBER 6, 1974

PLEASE TAKE NOTICE that James Talcott, Inc., appeals to the United States Court of Appeals for the Second Circuit from an order of Hon. Jacob Mishler, United States District Judge, dated and filed August 12, 1974, overruling its objections to the trustee's amended plan of reorganization and confirming the amended plan.

1 Copies Received

Date Nov. 25/74

Firm Weil Gotshal & Manges

By _____

1 Copies Received

Date Nov. 25/74.

Firm Joseph J. Marchese

By Anthony J. Schlossberg

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